

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 -against-

6 MARTIN SHKRELI,

7 Defendant.

15-CR-637 (KAM)

United States Courthouse
Brooklyn, New York

May 12, 2017
10:00 a.m.

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9 TRANSCRIPT OF CRIMINAL CAUSE FOR MOTION HEARING
10 BEFORE THE HONORABLE KIYO A. MATSUMOTO
11 UNITED STATES DISTRICT JUDGE

12 APPEARANCES

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1 (In open court.)

2 COURTROOM DEPUTY: All Rise. This is oral argument
3 on Mr. Shkreli's motion to compel documents, 15-CR-637, United
4 States Versus Martin Shkreli.

5 Will counsel on behalf of the Government state your
6 appearance.

7 MS. SMITH: Good morning, your Honor, Alixandra
8 Smith on behalf of the United States.

9 THE COURT: On behalf of non-party Retrophin.

10 MR. SCHWARTZ: William Schwartz, Nicholas Flath and
11 Ian Shapiro, Cooley LLP for Retrophin.

12 THE COURT: On behalf of defendant.

13 MR. AGNIFILO: Mark Agnifilo. I'm here with
14 Mr. Shkreli and Andrea Zellan and Teny Geregog.

15 THE COURT: Good morning. This is the defense
16 motion, so if you would like to be heard first, Mr. Agnifilo.

17 MR. AGNIFILO: So we're making a motion at this
18 point because we've essentially had a break down in our
19 ability to agree. I think we agreed on a great deal. And I
20 know that this issue was teed up for motions in maybe back in
21 November and December. And to Retrophin's credit and to
22 Cooley's client, we had productive dialogue. The dialogue
23 broke down a couple of months ago; it's prompted us to today.

24 Ultimately I'm trying to be reasonable. I think I,
25 probably in good faith, have given some of the case law and

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1 there is nothing terribly binding. We have some District
2 Court decisions that I've cited to your Honor. There is a
3 contrary decision from the Southern District, which we've
4 distinguished in our papers. But I, in good faith, I could
5 argue for a wholesale waiver of everything. And obviously I
6 lead with that, but saying I'm not going to do that.

7 THE COURT: I thought you had done that. So you're
8 not going to do that?

9 MR. AGNIFILO: I'm trying to be more surgical. I
10 think that I can argue for that. And the tricky thing for
11 someone in my position and this is one of the things I want to
12 throw out to your Honor, because I could see this coming down
13 the pike, we're trying to isolate the things that are most
14 relevant. And Ms. Zellan put together a colored chart in one
15 of our briefs, that was our way of prioritizing.

16 One of the concerns I have, I'll put it out there
17 now because your Honor might have thoughts about it, is this
18 is how we see the case today based on e-mails that we have and
19 discovery that we have. We're going to get 3500 material in
20 about a month. We're going to be getting other information
21 from the Government in about a month. Maybe nothing will
22 change; maybe we're predicting right, maybe the way we see the
23 case now will be the way we continue to see the case. But
24 things could change. And so why I bring up the wholesale
25 waiver, is because that may be easier later. What I mean by

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1 that is, we've prioritized now and we're in disagreement about
2 900 or so e-mails.

3 My concern, and I put it on your Honor's radar
4 screen is, I could see a situation where because of the way
5 something develops at the trial that there are e-mails that we
6 haven't been given that maybe with another e-mail puts it into
7 context. That is really part of what we're trying to do. And
8 that is part of what our prioritizations have been focused on,
9 things that are going to be important.

10 The capitalization table is important. It's alleged
11 in the indictment. A lot of our highest priority requests
12 relate to the capitalization table. There are e-mails that we
13 think Retrophin gave to the Government that might relate only
14 to one e-mail in that day, when in fact there is a whole
15 string of e-mails leading up to that e-mail; that happens a
16 few times.

17 And so what we're trying to do now, essentially, is
18 look to the future, not so far in the future because the trial
19 is almost upon us. What is going to come up at the trial and
20 how do we make sure now that we have the e-mails that we think
21 we need to give the Government's evidence context, and to have
22 our own evidence either on cross-examination or on our direct
23 case.

24 So my concern, the reason I led with yes, I do
25 believe that Retrophin -- for the reasons that I put in my

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1 brief and I don't need to go through them again -- has
2 essentially waived, as to the whole, anything that is a
3 communication involving Martin Shkreli or communications that
4 have to do with legal advice that would be going to Martin
5 Shkreli.

6 THE COURT: But you know you still have a hurdle
7 under Nixon and Rule 17 to show that it's relevant. Simply
8 because there is a communication on some other subject it
9 doesn't mean it's relevant to any of the charges or your
10 defenses.

11 MR. AGNIFILO: That is true. So and that's why --
12 there is two separate issues, your Honor. I agree with your
13 Honor, we don't -- just because there is a privilege waiver
14 doesn't mean it's relevant for purposes of Nixon. I think
15 that's right. What we tried to do through our prioritizations
16 is address essentially both issues at the same time. Because
17 the things that we believe are priorities are e-mails that
18 seem to directly relate to issues that are going to be part of
19 Government's case, the capitalization table for one; other
20 e-mails that I think that the Government is going to seek to
21 elicit, for another. It's hard to speak in the abstract.

22 THE COURT: You're not speaking in the abstract
23 because you've had the opportunity to review all of these
24 documents. And what I would have hoped to have had from you
25 is a more specific indication as to why these documents are

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1 documents that you need. It seems to me that you painted with
2 a very broad brush saying anything relating to Mr. Shkreli's
3 communications with a lawyer should be produced because it's
4 waived. And that's where I'm having trouble.

5 I think you're making a little more specific and
6 more articulate showing during the oral argument, but I would
7 say for the most part when you provided color coding for
8 priorities, I didn't get a sense that you had specifically
9 said, this e-mail is important because it's likely to be
10 exculpatory on the point of count whatever it is. Just trying
11 to explain with more specificity why you need this document.

12 You could probably well imagine that as we have been
13 going through these documents on the privilege log, it's a
14 much harder task. Because we, unlike the parties, the Court
15 is less familiar with all the players and the nitty gritty of
16 the transactions and the nuances that you might want to tease
17 out of these documents.

18 MR. AGNIFILO: Can I make a suggestion?

19 THE COURT: Yes. But I want to look back, as you
20 know, last evening we did issue an order. The reason for that
21 order was because our review, and we had gotten through a
22 fairly substantial portion, indicated that there were some
23 inconsistent redactions. There might have been some
24 overbreadth in terms of wanting to withhold documents that in
25 our view weren't apparently involved in an attorney-client

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1 communication. It might have involved an attorney, but it
2 wasn't really for the purpose of seeking or giving legal
3 advice. It just happened to be a discussion where one of the
4 attorneys was present and speaking with Mr. Shkreli or
5 exchanging e-mails with him. And I didn't think, at least on
6 Retrophin's part, for some of these documents there had been
7 an adequate showing of privilege in all instances.

8 And the other issue we had, was that we were looking
9 at sometimes three or four versions of the same e-mail train.
10 And in some of those trains a specific e-mail or statement was
11 redacted; but in identical e-mail trains it wasn't redacted.
12 We don't want to look at duplicates, triplicates or even
13 quadruplicates of documents. It's very difficult and
14 burdensome frankly. Fortunately my clerks have been involved
15 in document productions, they are aware that there are
16 programs to de-dupe.

17 The reason for the order last night was to say,
18 let's make it easier for everybody by eliminating duplicates,
19 by making sure that your redactions are consistent through
20 your assertions. And that you identify with better
21 specificity why you think it's privileged. Because it's not
22 clear to us based on our read of the document that there is
23 anything legal about the nature of the conversations.

24 But, you've seen these documents unlike many
25 defendants in the cases, so you do have the ability to make a

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1 better showing as to why these documents are important and
2 necessary or implicate Mr. Shkreli's constitutional rights.

3 MR. AGNIFILO: What I was going to suggest, your
4 Honor, following on what your Honor wrote to us last night, we
5 would be very happy to try to make the Court's job somewhat
6 easier by being more specific document by document. What I'm
7 wondering is, does it make the most sense to do what your
8 Honor asked in your Honor's order last night? Meaning, let's
9 de-dupe it and get the number down. And what I understood
10 your Honor to be asking from Retrophin, as well as this
11 morning, is to have clear showing of why certain things are
12 privileged. What you're asking is essentially relevance.

13 And so maybe it makes sense to your Honor to set the
14 date of May 17. If we could have the pare down list, I don't
15 know if it goes from 900 documents to 500 documents.

16 THE COURT: We're guessing it's going to get that
17 low, we think so when you say 400, 500.

18 Because even you didn't consistently color-code some
19 of these documents. It might have been a yellow, then orange,
20 then another place the same document was a red. Because there
21 are duplicates, it's very hard to keep track. I know these
22 programs could make it easier for everybody.

23 MR. AGNIFILO: Right. So what I was going to
24 suggest is, if Retrophin thinks it can meet your Honor's
25 deadline by the 17th, we could then maybe take, I don't know,

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1 five days or a week to go within that universe of 500 or so
2 documents and say this is really what we need, this is really
3 what we don't need, and try to give a reason to your Honor and
4 to Retrophin.

5 THE COURT: It also has to, as you know, if we're
6 going to look at Swidler and Judge Furman's discussion, you
7 have to demonstrate what touches on a constitutional right.
8 It has to rise to a need that would -- and I understand the
9 general concept that Mr. Shkreli has a right to present a
10 defense. But particularly, if you think a document is
11 exculpatory or bears specifically on a defense that he wants
12 to make, I understand that he's making the advice-of-counsel
13 defense. But it doesn't mean that every single communication
14 with a lawyer is going to be relevant to that defense.

15 MR. AGNIFILO: I understand. So what I think would
16 make -- the Court has a lot on its plate with all this, I
17 recognize.

18 THE COURT: This isn't my only case.

19 MR. AGNIFILO: I know. And what I'm hoping --
20 because I think we're okay, I think we're okay with time. I'm
21 glad we're doing this now rather than taking up a jury's time.

22 If Retrophin could do what it needs to do in a week.
23 If we can take another week and do exactly what your Honor is
24 asking, meaning this we think relates, this we think is
25 relevant because it puts another likely admitted e-mail from

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1 the Government in context, which might be not as compelling a
2 reason as -- I'll discuss Swidler in a second, I'm surprised
3 quite frankly that that case is invoked. I'll come back to
4 that in a minute.

5 THE COURT: They do say there is no reason to treat
6 the attorney-client privilege differently in a civil or
7 criminal case. But they also do say there may be instances
8 where the need in a criminal case raises constitutional
9 issues.

10 MR. AGNIFILO: But what is interesting about Swidler
11 is there is a special prosecutor. The prosecution is saying
12 criminal cases are, for lack of a better word, more important,
13 more compelling, than civil cases. So then we, the
14 prosecution, we should get access to Vince Foster's lawyer's
15 notes. There is no tie in to a criminal defendant's Sixth
16 Amendment right in Swidler. The prosecution wants it.

17 What happened is Judge Furman picked up on it. I
18 think for the general proposition, that criminal and civil
19 cases aren't on equal footing when it comes to the
20 attorney-client privilege, which may or may not be true. But
21 what Judge Garaufis and Judge Furman recognize is that in
22 criminal cases the criminal defendant has a Sixth Amendment
23 right, which changes things. What we'll try to do --

24 THE COURT: You need to tie in Mr. Shkreli's right,
25 Sixth Amendment right, to present a defense to the specific

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1 documents that you seek.

2 MR. AGNIFILO: We'll do that. What makes the most
3 sense, and hopefully makes everyone's life easier, we can pare
4 things down to five or 600. I think that Retrophin was
5 following our lead to a certain extent in de-duping or not
6 de-duping, there is no blame here.

7 THE COURT: I'm not blaming anybody. It was a
8 hellish process.

9 MR. AGNIFILO: Thank you, your Honor said it.

10 So we can pare this down. We'll do our part to
11 comply with the Sixth Amendment. We'll give that list to your
12 Honor.

13 THE COURT: I think you should work off the cleaned
14 up list that Retrophin hopefully can provide. You shouldn't
15 work on what is there, because again, your priorities were
16 sometimes inconsistent. I don't blame you for that, you can't
17 keep track mentally of what you've seen and what you want
18 redacted.

19 Should we hear from Retrophin, Mr. Schwartz?

20 MR. SCHWARTZ: Good morning, your Honor. Speaking
21 for my colleague Mr. Flath next to me, we agree this is a
22 hellish process. I don't know from hell, but he does.

23 I have a few things I'd like to address, your Honor.
24 The first is this notion of general waiver. While I know
25 you're not getting to that yet, I think it bears some

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1 attention. The argument that's made in Mr. Shkreli's papers
2 is essentially that we have waived, because we turned
3 documents over to the Government, and then somehow fit them
4 into subject matters post facto. That's absolutely not true.

5 Your Honor has seen all the papers. We turned
6 documents over. We did not turn over privileged documents to
7 the Government. We made a waiver. We informed the Government
8 of the scope of the waiver and the specific subject matters
9 that were waived. We were very careful to do it by subject
10 matter.

11 We then waited for the Government to litigate
12 Mr. Shkreli's claim of privilege before Judge Weinstein. And
13 when Judge Weinstein ruled the first time -- so that's --

14 The notion of the general waiver because we somehow
15 were willy-nilly giving documents to the Government is
16 inaccurate.

17 The second argument that they make is this sword and
18 shield argument. There was no sword and no shield. We looked
19 at what the Government had asked us to look at, we waived.
20 Then when Mr. Shkreli came to us with subject matters that he
21 thought were relevant, we made exactly the same kind of
22 assessment that we made with respect to the Government's
23 request, and we waived with respect to ten separate subject
24 matters. So we've treated both sides exactly the same here.

25 The issue now is, I think it's fair to say, that at

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1 least the way we look at the case, every privileged
2 communication that is relevant to the charges in the case has
3 been waived and turned over through these 14 different subject
4 matters to the parties. We're now talking about documents
5 that fall, at least in our view, well outside the scope of
6 those subject matters and well outside the scope of what this
7 case is about.

8 THE COURT: I would agree with you. With all do
9 respect to Mr. Agnifilo, I don't believe that there is a
10 general waiver. If you look at the Treacy case, Judge
11 Rakoff's decision. First of all, there are no documents that
12 have been provided by Retrophin only to one party; all
13 documents have been provided to both parties. So it would be
14 unfair to say that they had withheld certain documents from
15 the defense, but only given them to the Government and they
16 are using the documents as a sword and shield.

17 And if there are such documents, you have not
18 identified them, the defense has not identified them. Nor has
19 the defense identified documents in the privilege log that are
20 of the same subject matter that would perhaps warrant
21 consideration under Rule 502(a) as an intentional waiver. And
22 are there still undisclosed documents that bear on the same
23 subject matter that should also be provided.

24 We're now seeing a lot of documents in the
25 privileged documents that could be said to bear on the

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1 previously disclosed subject matters. But if there are such
2 documents, certainly you should identify them.

3 MR. SCHWARTZ: So your Honor, the second point I'd
4 like to discuss, I understand from your order that your Honor
5 may be undertaking some kind of balancing test about whether
6 he should get the documents or not get the documents. We
7 think that both the Supreme Court and the Second Circuit have
8 been pretty clear that there shouldn't be a balancing test.

9 THE COURT: Actually they talk about performing a
10 balancing test in weighing a Sixth Amendment right against any
11 other privilege but for the attorney-client privilege, they
12 discourage the balancing test. So what is a Court left with?
13 I mean, I think that the rule itself says unless required by
14 the Constitution, privileges have to be acknowledged by the
15 Court, Rule 501 I think it is. So what can Courts do except
16 balance? I'm not in a position to balance right now. I don't
17 think either party has made sufficient showings to me.

18 MR. SCHWARTZ: I understand that, your Honor. But
19 the argument that is being made here doesn't even go to
20 constitutional rights, it goes to relevance. The one thing we
21 all know about privilege in every case is that privileged
22 documents -- in all criminal cases there are privileged
23 documents floating around that may be relevant. Relevance is
24 not the touchstone of anything in this case. It should not be
25 the touchstone for waiver of attorney-client privilege, even

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1 if you follow the Weisberg case. The touchstone is that it's
2 constitutionally compelling, that due process is at stake.
3 Not that the document may bear in some way on the issues
4 tried, but that the defendant is deprived of a fair trial if
5 he does not have access to that document.

6 THE COURT: I think the defense knows that. I think
7 he's committed to identifying those documents once you
8 provide.

9 MR. SCHWARTZ: What I hear from Mr. Agnifilo, from
10 what he's talking, is relevance, relevance, relevance. That's
11 not the standard that ought to be applied. If any standard
12 should be applied here it should not be relevance. The burden
13 on him I think at this point, if we can show that the
14 documents are privileged, is very high. It is to show that
15 there is a constitutional and compelling reason that he will
16 be deprived of due process if the document is not turned over.
17 I think given knowing what I know about these documents, I
18 think that's a standard that he can't meet. Obviously he's
19 going to try again. But I would ask the Court when its
20 reviewing that, to keep that constitutional standard in mind.

21 THE COURT: We certainly will.

22 Let me ask you, Counsel, is the May 17 date doable?

23 MR. SCHWARTZ: Let me confer with my colleagues.

24 THE COURT: My colleague clerks who have been in
25 your colleagues' shoes advised me it should be doable.

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1 MR. SHAPIRO: I think if we're de-duping and sort of
2 reassembling the threads and e-mail chains that are subsets of
3 each other and ensuring each review, we can do that by the
4 17th.

5 THE COURT: There is another piece, you have the
6 burden to establish that the document is privileged
7 attorney-client communication, and for some of the documents
8 it's just not clear why they are in there.

9 MR. SHAPIRO: We will go back through every document
10 before the 17th, we can do that. I think in so far as the
11 order encouraged us to provide more of a description, I think
12 that part becomes hard to do by the 17th. Perhaps
13 Mr. Agnifilo doesn't need that, at least in the case of all
14 the documents where he already has the document. So
15 everything else but that last part where we would be
16 supplementing all of the descriptions, is doable by the 17th.

17 I know that there are documents in here I think
18 which Mr. Agnifilo doesn't have because Mr. Shkreli was not a
19 party of the communication and didn't receive it under the
20 Court's prior orders. We'll supplement those descriptions by
21 the 17th.

22 THE COURT: Let me confer with my clerk for one
23 minute.

24 I understand that an associate tasked with doing the
25 doc review might have some difficulty, I'm not criticizing

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1 whoever did this. But my point is that there were some
2 documents where I think some review should have been made
3 about the designation about an attorney-client privilege
4 document. The substance of the communications, at least as
5 far as I could tell, was not even remotely in the context of
6 giving or receiving legal advice.

7 I would give you a document number if I could, but
8 we -- I can do that now, maybe you can see my problem. It's
9 BA0008930, that one was kind of a mystery to us. Because
10 although it may have involved an attorney and the Retrophin
11 individual, it just wasn't on its face.

12 MR. SHAPIRO: We'll address all of that. I totally
13 get what you're saying. One other point, because the way the
14 documents were produced by Katten, it wasn't possible to avail
15 ourselves of the electronic de-duping software. We didn't not
16 avail ourselves of that. We'll now be doing it manually; it's
17 not that big of a deal. That's why we didn't do it in an
18 automated way, the way your clerks were describing to you.

19 THE COURT: All right. Well, maybe you can confer
20 with Katten and ask them to give you some format that would
21 allow it.

22 In any event, I think that if May 17th is a doable
23 date then what would the defense need in terms of time after
24 the 17th to revise its pitch for breach of the attorney-client
25 privilege?

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1 MR. AGNIFILO: I think the only wrinkle is, I guess
2 there are certain documents that we don't see, we get
3 descriptions of. And so I don't know how you guys would do
4 it, it would be easier in time if you do those first, give
5 those to us. I think we could turn it around in a week.

6 THE COURT: All right. I guess at the same time you
7 provide your revised description, you'll give me the documents
8 or identify those by Bates numbers as well so we'll start
9 looking at them. Because, it's not always clear to us what
10 they have and what they haven't been able to review.

11 MR. SCHWARTZ: Yes, your Honor.

12 THE COURT: Okay.

13 MS. SMITH: Your Honor, from the Government's
14 perspective, obviously we're not involved in the motion, but
15 we're in a very strange position for the Government. Because
16 the documents went from Katten to Mr. Shkreli. Then
17 Mr. Shkreli and Retrophin have been discussing what documents
18 are kind of now outside of the privilege. We have received
19 from defense counsel all of the MSMB documents from Katten
20 where the privilege was waived. We have not received from
21 defense counsel any Retrophin documents where the privilege
22 was waived. We would request that when there is the universe
23 of documents from this production related to Retrophin over
24 which the privilege has been waived, that they be then
25 provided to the Government. Because otherwise we're in a

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1 position where they have non-privileged documents that they
2 are claiming are relevant to the case to use at trial that
3 they have not produced.

4 THE COURT: So Retrophin did not give you those
5 documents?

6 MS. SMITH: They haven't given us yet because we are
7 discussing the final scope.

8 MR. SHAPIRO: The documents were provided from
9 Katten to Mr. Shkreli. And then Mr. Shkreli asked us to waive
10 on certain subjects of documents. But Mr. Shkreli already had
11 all of those documents, so whether Mr. Agnifilo produces them
12 to the Government or we do, we'll work that out.

13 MS. SMITH: I just wanted to put that on the record.

14 THE COURT: Thank you. It was a little strange to
15 serve a subpoena not on Retrophin, but on its former counsel.
16 I know that was done in the Treacy case, but it seems usually
17 you serve the subpoena on the party whom you're seeking
18 documents because they are at a disadvantage when you hit the
19 attorney for the client's documents, just going forward.

20 All right. Are you going come back for oral
21 argument or once we get squared away move forward on the
22 submissions?

23 MR. SCHWARTZ: I think at this point, your Honor,
24 why don't we wait and see what everybody submits, then we can
25 let the court know.

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1 THE COURT: All right.

2 MR. AGNIFILO: We're going to try to agree. I'd
3 rather -- we have bigger battles to fight -- we do, they
4 don't -- in the future. I'd rather save my powder for those.
5 We'll talk in good faith, as we have, with Retrophin.

6 THE COURT: All right. I do appreciate Retrophin's
7 counsel and Retrophin itself in trying to be reasonable and
8 working despite a reasonable view that it could be all of
9 this, but none the less.

10 MR. AGNIFILO: We don't think so.

11 THE COURT: I understand.

12 MR. AGNIFILO: Before we break, at the last court
13 date I requested -- and just in fairness, your Honor didn't
14 rule one way or the other -- that the Government provide us
15 with the subpoenas that are provided to Retrophin. What they
16 did is they submitted a letter that had I guess the contents
17 of the subpoenas but not the subpoenas. And the subpoenas
18 themselves are relevant because I think it's relevant to see
19 what they ask for at different times. What they got at
20 different times. And so I would just renew that request.

21 MS. SMITH: Your Honor, the Government doesn't
22 publicly file subpoenas, Grand Jury subpoenas.

23 THE COURT: They were all Grand Jury?

24 MS. SMITH: They were all Grand Jury subpoenas.
25 That's why we provided the request and the attachments rather

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1 than the physical subpoenas. We're happy to advise defense
2 counsels which dates the various requests were on.

3 MR. AGNIFILO: I guess what confuses me, there is a
4 subpoena issued four months ago. There is no Grand Jury
5 sitting four months ago. I don't understand that part of it.

6 MS. SMITH: The investigation is ongoing. And there
7 are other individuals and other issues related to this, even
8 though this particular case with this particular piece of it,
9 this is not the only individual that's connected to this that
10 the Government is still looking at for related issues.

11 MR. AGNIFILO: One of the concerns I have there,
12 Judge is, as is black letter law, you can't use Grand Jury
13 subpoenas to prepare for trial. And I'm not besmirching the
14 good faith of the Government, but if the Grand Jury subpoena
15 is issued in January I think it raises the issue of what are
16 they asking for? What are they investigating? Is that a good
17 faith use of a Grand Jury subpoena?

18 It's odd. At this point the superseding indictment
19 had been returned. A trial was five months away, and there is
20 a Grand Jury subpoena. It raises a lot of questions.

21 THE COURT: Well, I trust the Government understands
22 what is proper and what is not. And they will not be using
23 any documents yielded from the January Grand Jury subpoena in
24 this case.

25 MS. SMITH: Your Honor, we provided all of those

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1 documents to the defense. Most recent subpoenas were actually
2 related to arbitration documents. I think those are the last
3 few requests that came out, some of which defense counsel
4 already has.

5 Like I said, Mr. Shkreli is not the only person that
6 was looked at in connection with this investigation. There
7 are ancillary issues. Certainly to the extent that the
8 documents are relevant for this case, we would be using them.
9 But I think most of the documents are actually just kind of in
10 connection with this particular case, as opposed to the other
11 investigation that might be ongoing or filling in gaps.
12 Frankly, defense itself has asked for documents related to,
13 but that's where we are.

14 MR. AGNIFILO: I think it's all more important to
15 try to get the subpoenas. We don't know, there may be a basis
16 legally to challenge the admissibility of any evidence that
17 was gained as a result of the January Grand Jury subpoena. We
18 don't know what that is. So I think it's relevant. And I
19 think it's more relevant than even before we knew this was a
20 Grand Jury subpoena that we get the subpoenas. We can do it
21 on a protected order, give them to us and not file them
22 publicly. We'll be happy to agree to such an order to
23 safeguard whatever. It's a subpoena, so it's not a private
24 document. It was given to Retrophin. I don't know what they
25 are trying to protect. I'm willing to sign a confidentiality

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1 order.

2 I think it's important that we understand what
3 documents were gathered by what subpoena, especially if a
4 Grand Jury subpoena is being used four months ago.

5 THE COURT: Well, what is your response, Ms. Smith?

6 MS. SMITH: We're happy to provide them. We're not
7 going to file them publicly, which is why we put the request
8 on because obviously those, the face of the subpoena should
9 not be filed publicly. The most recent one involved the
10 Rosenfeld arbitration, which Mr. Agnifilo has asked for
11 documents on. I'm not sure what he's talking about in terms
12 of sub-protection. We can reissue the trial subpoena for the
13 same documents if Mr. Agnifilo would like us to do that. We
14 will provide the dates and kind of give them that information.

15 MR. AGNIFILO: I appreciate that.

16 THE COURT: Is there in anything else?

17 MR. AGNIFILO: No. I guess, I'm not sure if we left
18 it what makes the most sense. We'll get a week, then we'll
19 let your Honor know if we need oral argument?

20 THE COURT: Seven days after the 17th which brings
21 us to the 24th.

22 MS. ZELLAN: Your Honor, on a separate issue we've
23 been in discussion with the Government with respect to voir
24 dire. I think that we have a proposal for the Court to
25 consider with respect to a jury questionnaire. We can submit

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1 that either today after court or later, or we could describe
2 it in more detail now, if your Honor would like.

3 THE COURT: Well, I think I'd like to see it in
4 writing first. We've asked for 120 jurors, is that enough?
5 Look, we have to pay these people and we have to make sure we
6 use them adequately. I know in the process of questionnaires
7 we knock out people automatically for whatever reason they
8 cannot sit for the trial. What I've done in the past is when
9 there are questionnaires we set a date in advance for the
10 jurors to fill them out, then set a short time frame for the
11 parties to confer which of those jurors they agree should be
12 excused for cause or hardship or whatever reason. And then
13 hopefully we have enough left to do a jury selection. I'm
14 contemplating four alternates, is that enough?

15 MR. AGNIFILO: Here's is my question, if we run out
16 what do we do then? We have to wait two weeks?

17 THE COURT: No, we borrow from another jury pool.
18 There will be jurors from other trials called in. Jurors will
19 be randomly selected as to the which will be the 120 to fill
20 out the questionnaires. If we need more people, we'll pull
21 those who have been excused.

22 MR. AGNIFILO: I think that's fine. I think with
23 the summer we're going to hit vacation plans and whatnot.
24 People don't expect four-week trials. I think that's fine.

25 THE COURT: Yes. We found jurors for six-week

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1 trials in the summer in the past. I think we can do it again.

2 All right. Thank you. I'll get your agreed-upon
3 voir dire for the questionnaire only.

4 MS. ZELLAN: Yes, the questionnaire only. We agreed
5 on certain other questions that we asked your Honor to include
6 in your questioning of the perspective jurors. We'll submit
7 those as well.

8 THE COURT: All right. Thank you. Have a nice day.

9 (Whereupon, the matter was adjourned.)

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14 I certify that the foregoing is a correct transcript from the
15 record of proceedings in the above-entitled matter.

16 Rivka Teich, CSR RPR RMR
17 Official Court Reporter
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Rivka Teich CSR, RPR, RMR
Official Court Reporter